

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that she has a ratable permanent impairment of the bilateral upper extremities, thereby warranting a schedule award.

FACTUAL HISTORY

Appellant, a 59-year-old nursing assistant, has an accepted occupational disease claim (Form CA-2) for bilateral (shoulder) bursitis, which arose on or about April 7, 2010.³ OWCP paid her wage-loss compensation for temporary total disability for the period May 17 through June 2, 2011, and resumed work in a light-duty capacity beginning June 3, 2011. In November 2014, appellant's treating physician released her to resume full duty.⁴

On April 7, 2015 appellant filed a claim for a schedule award (Form CA-7). Although her treating physician, Dr. Thesselon Monderson, a Board-certified orthopedic surgeon specializing in hand surgery, advised on March 16, 2015 that she had reached maximum medical improvement, he did not provide an upper extremity impairment rating.

On April 9, 2015 OWCP advised both appellant and her counsel of the need to submit an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*). It afforded her at least 30 days to submit the requested medical evidence. On May 11, 2015 OWCP contacted appellant's treating physician directly regarding the existence and extent of any ongoing residuals due to her accepted bilateral shoulder bursitis. No response was received within the time allotted.

By decision dated June 10, 2015, OWCP denied appellant's claim for a schedule award. It explained that it had not received the previously requested impairment rating under the A.M.A., *Guides* (2009).

Counsel timely requested an oral hearing before an OWCP hearing representative, which was held on February 8, 2016.

Subsequent to the hearing, OWCP received a September 30, 2015 impairment rating from Dr. Samy F. Bishai, a Board-certified orthopedic surgeon. Dr. Bishai's diagnoses included cervical degenerative disc disease, bilateral shoulder impingement syndrome, bilateral shoulder internal derangement, and bilateral shoulder joint rotator cuff syndrome.⁵ He found 24 percent

³ Although the May 23, 2011 acceptance letter does not specifically identify the shoulder region as the site of appellant's accepted bilateral bursitis, her April 8, 2011 Form CA-2 identified an injury involving "[bilateral shoulder]."

⁴ Appellant subsequently applied for disability retirement, which was approved in December 2015.

⁵ Dr. Bishai noted that appellant was approved for her shoulder joint injury only, and was not approved for the neck condition although she insisted the latter was definitely work related as both the bilateral shoulder and neck conditions occurred at the same time on April 7, 2010.

bilateral upper extremity using the range of motion (ROM) impairment ratings based on the residual problems she was having with her right and left shoulder joints. Dr. Bishai rated appellant under Table 15-34, Shoulder Range of Motion, A.M.A., *Guides* 475 (2009).⁶ He explained that ROM was the only accurate method of assessing appellant's impairment for schedule award purposes.

In a March 30, 2016 decision, the hearing representative affirmed OWCP's June 10, 2015 decision denying a schedule award. Although Dr. Bishai found 24 percent permanent bilateral upper extremity impairment, the hearing representative found the evidence insufficient to warrant a schedule award because the diagnosed conditions had not been accepted by OWCP, and appellant's physician was apparently unaware of the actual accepted employment-related condition(s).

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.⁷ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁸ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁹

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

⁶ With respect to appellant's right shoulder, Dr. Bishai found 9 percent permanent upper extremity impairment for loss of flexion (80 degrees), 2 percent for loss of extension (15 degrees), 6 percent for loss of abduction (80 degrees), 1 percent for loss of adduction (20 degrees), 4 percent for loss of internal rotation (20 degrees), and 2 percent for loss of external rotation (45 degrees), for a total 24 percent permanent right upper extremity impairment. Regarding the left shoulder, he found 9 percent permanent upper extremity impairment for loss of flexion (75 degrees), 2 percent for loss of extension (10 degrees), 6 percent for loss of abduction (75 degrees), 1 percent for loss of adduction (15 degrees), 4 percent for loss of internal rotation (15 degrees), and 2 percent for loss of external rotation (40 degrees), which also totaled 24 percent permanent impairment of the left upper extremity.

⁷ See 20 C.F.R. §§ 1.1-1.4.

⁸ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁹ 20 C.F.R. § 10.404; see also Ronald R. Kraynak, 53 ECAB 130 (2001).

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹⁰ The Board has approved OWCP's use of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹¹

ANALYSIS

The issue is whether appellant has met her burden of proof to establish that she has a ratable impairment of the bilateral upper extremities. The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the diagnosis-based impairment (DBI) or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹² The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹³ In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.¹⁴

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the March 30, 2016 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

¹⁰ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013);.

¹¹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹² *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁴ *Supra* note 12.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 5, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board